

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-743

COMMONWEALTH

vs.

VIRGINIA BAEZ-MEJIA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this case, a trial judge dismissed an assault and battery complaint without prejudice after the Commonwealth answered not ready for trial. One week prior, the Commonwealth's assigned trial attorney did not appear on the jury trial selection date because of a medical emergency and instead a stand-in prosecutor answered for the government. The judge on that date, seemingly in response to the absence, along with (as the judge put it) the "one, two, three, four, five -- six different court events" preceding the first appearance date, ordered there to be no further continuances, retained oversight of the case, and set a trial date for the following week over the Commonwealth's objection. When the trial date came and the Commonwealth answered not ready, the judge dismissed the complaint. On appeal, the Commonwealth argues that the judge's

disposition of the case was an abuse of discretion. We agree and vacate the order of dismissal.

Background. On April 11, 2017, a complaint issued from the Charlestown Division of the Boston Municipal Court charging Virginia Baez-Mejia, the defendant, with assault and battery under G. L. c. 265, § 13A (a). The defendant was alleged to have spat in the face of an individual with whom she was acquainted. The victim was the Commonwealth's primary witness.

Despite the relative simplicity of the case, its first scheduled jury-waived trial date did not occur until January 22, 2018. On that date, the Commonwealth answered ready for trial with the victim, the essential witness, present in court. However, in response, the defendant exercised her right to a jury trial. As jury trials are not available in the Charlestown Division, the case was continued to March 1, 2018, and transferred to the Central Division of the Boston Municipal Court for a jury trial selection date.

On Thursday, March 1, 2018, the parties appeared before a judge in the Central Division. The proceeding began with the defendant complaining to the judge that her defense counsel had failed to appear. She requested new trial counsel. Appearing to be frustrated, the judge also noted that the assistant district attorney (ADA) assigned to the case was not present. The stand-in ADA informed the judge that the assigned ADA was

dealing with a medical emergency. The judge replied, "I think three people or maybe four had medical emergencies today for some reason."¹ During a further exchange with the defendant, the judge indicated that he did not believe the case should have been transferred to the Central Division at all.² He ultimately assigned her new counsel who was present at the session.

When the judge then asked the stand-in ADA for a suggested date for trial, she first volunteered that any Thursday would work. The judge suggested the following Thursday. The stand-in ADA, realizing that was only one week away, requested "a little bit further of a date to make sure the witnesses are all properly notified." The judge denied the request and set the trial date for March 8, the next Thursday. He also ordered that there be no further continuances, and that he retain oversight

¹ Judge: "Yeah, I'm surprised [the assigned ADA] isn't here, with a case of such significance. [The group altercation at issue apparently also involved a stabbing.] Is it that busy in Charlestown that he couldn't be here today?"

Stand-in ADA: "No, Your Honor. He had a medical emergency. I apologize for the delay. I'm just trying to --"

Judge: "I think about -- I think three people or maybe four had medical emergencies today for some reason."

² The judge stated, "I would suspect that the case doesn't even belong here, because I'm sure it could have been handled at the Charlestown [Division]. That's my humble opinion. Okay?"

of the case.³ The Commonwealth objected to the one-week trial date.

One week later, on March 8, the Commonwealth answered not ready for trial. The assigned ADA, back from his medical emergency, told the judge that in the interim neither he nor the victim-witness advocates had contacted the sole Commonwealth witness in the case. He also described his medical issue as "pretty serious" and requiring him to be "out for some days." Defense counsel then took the opportunity to remind the judge that he had marked the matter for no further continuances. The judge dismissed the complaint without prejudice, and remitted fees, fines, and costs. The Commonwealth timely appealed.

Discussion. The Commonwealth argues that the judge abused his discretion by dismissing the case.⁴ "Where a judge dismisses a criminal complaint without prejudice, the judge's decision shall be upheld absent an abuse of discretion." Commonwealth v. Gardner, 467 Mass. 363, 368 (2014). "[A] judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made 'a clear error of judgment in weighing' the factors relevant to the decision, such that the decision falls

³ The judge stated, "No further continuances. Mark it back to my attention."

⁴ The Commonwealth acknowledges that a dismissal without prejudice allows a reprosecution of the defendant on the same charge. Nonetheless, it chooses to appeal because of the issue involved.

outside the range of reasonable alternatives" (citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). Dismissal has been considered appropriate "where the Commonwealth has repeatedly failed to produce its witnesses and effectuate a prosecution." Commonwealth v. Clark, 454 Mass. 1001, 1002 (2009).

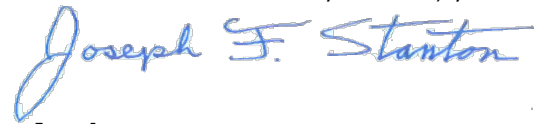
Here we conclude that dismissing the case without prejudice was an abuse of discretion. The judge's decision-making reflects a frustration evident from the transcript, while the source of that frustration is unclear. While it is true that the Commonwealth, between March 1 and March 8, could have at least reached out to the key witness in order to secure her presence at the March 8 hearing, the Commonwealth's error falls well short of the standard set by other cases where a dismissal without prejudice has been affirmed. See, e.g., Commonwealth v. Joseph, 27 Mass. App. Ct. 516, 518-519 (1989) (case had been continued three times because Commonwealth, without justification, failed to provide defense counsel with police report). See also Commonwealth v. Anderson, 402 Mass. 576, 577 (1988) (prosecutor was repeatedly tardy). Indeed, here the Commonwealth had answered ready for trial at the only other scheduled trial date and had objected to the March 8 date. This objection was reasonable in light of the prosecutor's unspecified medical emergency and the unnecessarily short window

in which to prepare.⁵ There was no record support to doubt the Commonwealth's representation that the assigned ADA was out for medical purposes for a number of days. Contrast Anderson, 402 Mass. at 577 (no apparent reason for prosecutor's repeated tardiness and unpreparedness).

"[A] judge has a 'legitimate "concern over the court calendar and the need to move cases along"' (citation omitted). Commonwealth v. Butler, 87 Mass. App. Ct. 183, 187 (2015). Nonetheless, the judge's inflexibility seems at odds with the minimal fault, if any, on the part of the Commonwealth. See id. at 186-189. See also Gardner, 467 Mass. at 368. As such, we vacate the order dismissing the complaint.

So ordered.

By the Court (Desmond,
Sacks & Lemire, JJ.⁶),



Clerk

Entered: July 8, 2019.

⁵ We also highlight the fact that the judge, minutes earlier, had appointed new counsel for the defendant. The judge's directive for a March 8 trial date provided the defense attorney only one week from appointment to prepare for trial.

⁶ The panelists are listed in order of seniority.